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Nos. 02-1776, 02-1784

IN THE

Supreme Court of the United States

LESTER I. TENNEY, ET AL.,
Petitioners,
v.
MITSUI & CO., LTD., ET AL.,
Respondents.

ALBERTO SALDAJENO, ET AL.,
Petitioners,
v.
ISHIHARA SANGYO KAISHA LTD., ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

The decision below in these related petitions (Nos. 02-1776, 02-1784) held that California Code of Civil Procedure § 354.6 is preempted by the foreign affairs power of the federal government. These petitions ask this Court to resolve the following questions related to that decision:

1. Whether the decision is correct.

2. Whether the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Treaty") prohibits these private causes of action against private Japanese companies.

3. Whether the Treaty violates international law by waiving the claims at issue in certain of these cases, given that they involve allegations of wartime forced labor.

4. Whether the court below properly decided a question of state law that the court noted "did not affect the outcome" of the case.

5. Whether there is removal jurisdiction over certain of these cases.

Rule 29.6 Corporate Disclosure Statement

Ishihara Corporation (U.S.A.)'s ultimate parent corporation is Ishihara Sangyo Kaisha, Ltd., and no other publicly traded company owns 10% or more of its stock.

Ishihara Sangyo Kaisha, Ltd. does not have any parent companies. Mitsui & Co, Ltd. is the only publicly held company that owns 10% or more of its stock.

ISK Americas Incorporated is a subsidiary of Ishihara Sangyo Kaisha, Ltd. No other publicly held company owns 10% or more of its stock.

Mitsui Mining Co., Ltd. is a Japanese public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock.

Mitsui Mining USA, Inc. is a 100% subsidiary of Mitsui Mining Co., Ltd.

Mitsubishi Corporation is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsubishi Corporation. Mitsubishi International Corporation is a wholly-owned subsidiary of Mitsubishi Corporation.

Mitsubishi Heavy Industries, Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Mitsubishi Heavy Industries America, Inc., is a wholly-owned subsidiary of Mitsubishi Heavy Industries, Ltd.

Mitsubishi Materials Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Mitsubishi Materials U.S.A. Corporation's parent corporation is Mitsubishi Materials Corporation, and no other publicly held company owns 10% of Mitsubishi Material U.S.A. Corporation's stock or more.

Mitsui & Co., Ltd. is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsui & Co., Ltd. Mitsui & Co. (U.S.A.), Inc. is a wholly-owned subsidiary of Mitsui & Co., Ltd.

Nippon Steel Corporation is a Japanese public company, listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Nippon Steel U.S.A., Inc. is a wholly-owned subsidiary of Nippon Steel Corporation.

Nippon Steel Trading Co., Ltd. is a Japanese public company. Nippon Steel Corporation and Mitsui & Co., Ltd. are the only publicly held companies that own 10% or more of its stock.

Nippon Steel Trading America, Inc., is a wholly-owned subsidiary of Nippon Steel Trading Co., Ltd.

Taiheiyo Cement Corporation is a Japanese business association listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Taiheiyo Cement U.S.A., Inc. is a wholly-owned subsidiary of Taiheiyo Cement Corporation.

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BRIEF OF RESPONDENTS IN OPPOSITION

Petitioners in these related cases (Nos. 02-1776, 02-1784) offer no plausible reason why this Court should review the decision below. The judgment of the U.S. Court of Appeals for the Ninth Circuit correctly holds that a California statute creating a cause of action for World War II era reparations claims – section 354.6 of the California Code of Civil Procedure – is preempted by the core federal power to make and resolve war. The United States exercised this power in the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Treaty") (02-1776 Pet. App. 87a), which explicitly precludes the claims asserted by petitioners. The court of appeals' ruling is supported by the *amicus curiae* position of the United States below.[1]

Petitioners do not contend that there is any conflict between the ruling below and any decision of this Court. Nor do they identify any conflict among the federal courts of appeals or state courts of last resort with respect to any question addressed by the court below. Indeed, the petitions are effectively moot. Shortly after the petitions were filed, this Court issued its decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003). In circumstances where the state law intrusion into the federal government's exclusive foreign affairs power was less obvious than it is here, *Garamendi* held another California statute regulating

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[1] The United States filed a Statement of Interest in the district court below, advocating dismissal of petitioners' claims on foreign relations grounds. *See* Statement of Interest of the United States of America ("Statement of Interest") (SER 338-75). "SER" refers to the Supplemental Excerpts of the Record filed jointly in the Ninth Circuit by respondents in the cases brought by each of the petitioners here. The United States filed an *amicus curiae* brief in the court of appeals reaffirming its view that section 354.6 impermissibly interferes with foreign relations and is preempted by federal law. *See* Brief for *Amicus Curiae* The United States of America, Nos. 01-17115 *et al.* (9th Cir. June 6, 2002).

World War II claims to be preempted by the foreign affairs power of the federal government. *Garamendi* confirms the court of appeals' conclusion that the statute at issue in these cases is preempted. The petitions should be denied.

OPINIONS BELOW

The petition in No. 02-1776 fails to note that the district court opinion included in its appendix, 02-1776 Pet. App. 69a, only applies to petitioners in Nos. 01-17115, 01-17124, 01-17134, 01-17155, 01-17185, 01-17195, 01-17252, and 01-17499.[2] The petition properly reflects that this opinion is reported at 114 F. Supp. 2d 939. With respect to the remaining POW petitioners (in Nos. 01-17116, 01-17123, and 01-17157), the opinion of the district court is unreported and is attached in the appendix hereto. App. 1a-6a.

The petition in No. 02-1784 correctly observes that the relevant opinion of the district court is reported at 164 F. Supp. 2d 1153.[3]

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[2] The following cases are before the Court as part of this petition: *Hutchison v. Mitsubishi Materials Corp.*, No. 01-17115; *Tenney v. Mitsui & Co., Ltd.*, No. 01-17116; *Rubenstein v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17123; *Heimbuch v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17124; *Solis v. Nippon Steel Corp.*, No. 01-17134; *Corre v. Mitsui & Co., Ltd.*, No. 01-17155; *Dunn v. Nippon Steel Corp.*, No. 01-17157; *Eneriz v. Mitsui & Co., Ltd.*, No. 01-17185; *Poole v. Nippon Steel Corp.*, No. 01-17195; *Alfano v. Mitsui & Co. (USA), Inc.*, No. 01-17252; and *Price v. Mitsubishi Corp.*, No. 01-17499. Six other cases involving U.S. or Allied POWs with claims under section 354.6 – *King v. Nippon Steel Corp.*, No. 01-17160; *Levenberg v. Nippon Sharyo Ltd.*, No. 01-17189; *Wheeler v. Mitsui & Co., Ltd.*, No. 01-17210; *Mente v. Mitsui & Co., Ltd.*, No. 01-17230; *Terrence v. Mitsui & Co., Ltd.*, No. 01-17260; and *Titherington v. Japan Energy Corp.*, No. 01-17265 – were also consolidated at the district court and the court of appeals, but the plaintiffs in those cases did not join the petition here.

[3] The following cases are part of this petition: *Llanza v. Mitsui & Co. (U.S.A.)*, No. 01-17172; *Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17176; and *Santo Domingo v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

The following provisions of the United States Constitution are included in the appendix attached hereto:

Article I, § 8, cls. 1, 10-14 (App. 21a).

Article I, § 10, cls. 1, 3 (App. 22a).

Article II, § 2, cls. 1, 2 (App. 22a-23a).

The 1951 Treaty of Peace with Japan is included in the petitioner's appendix in No. 02-1776 (02-1776 Pet. App. 87a-121a).

Relevant excerpts of the War Claims Act of 1948, as amended and codified in 50 U.S.C. app. §§ 2001 et seq., are included in the appendix attached hereto (App. 7a-20a).

Section 354.6 of the California Code of Civil Procedure is set forth in full in the Ninth Circuit's opinion, 02-1776 Pet. App. 42a-43a, and in the petitioners' appendix in No. 02-1776 (*id.* at 122a).

STATEMENT OF THE CASE

Petitioners in No. 02-1776, and the putative classes they claim to represent, are United States service members, or their heirs, who claim they were subjected to forced labor during the time they were held as prisoners of war ("POWs") by Japan during World War II. Petitioners in No. 02-1784, and the putative classes they claim to represent, are citizens and residents of the Philippines during World War II (or

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17177. Another case involving Filipino claims – *Resus v. Mitsui & Co., Ltd.*, No. 01-17204 – was also consolidated at the district court and the court of appeals, but the plaintiffs in that case did not join this petition.

their heirs) who claim to have been subjected to forced labor during the Japanese occupation.[4]

A. Background

Beginning in 1999, petitioners filed lawsuits (ultimately combined in a single multidistrict litigation proceeding) seeking reparations for the labor they allegedly were forced to perform for Japanese corporations while held as POWs by the Japanese military, or as internees in the Philippines. The purported authority for these lawsuits, brought almost sixty years after the alleged underlying acts occurred, is section 354.6 of the California Code of Civil Procedure.

Section 354.6 permits any "Second World War slave labor victim . . . or Second World War forced labor victim" to bring suit "to recover compensation for labor performed" during World War II against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Civ. Proc. Code § 354.6(b) (2003). The statute defines "compensation" as "the present value of wages and benefits that individuals should have been paid and damages for injuries sustained." *Id.* § 354.6(a)(3). The statute also provides that an action brought under it will be timely if commenced on or before December 31, 2010. *See id.* § 354.6(c).

This statute was enacted nearly fifty years after the United States and forty-six other Allied Powers formally ended the war in the Pacific by signing the multilateral Treaty, *supra*, 3 U.S.T. 3169-3328 (02-1776 Pet. App. 87a-

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[4] All references to "POW petitioners" are to the petitioners in No. 02-1776. All references to "Filipino petitioners" are to the petitioners in No. 02-1784. No classes have been certified in any of petitioners' cases; putative class members allegedly number in the "thousands." *E.g.*, *Alfano* Complaint (SER 124); *Saldajeno* Complaint (ER tab 2).

121a).[5] Under the Treaty, Japan agreed to pay the Allied Powers approximately $4 billion in reparations from various sources – primarily from the assets of Japanese nationals, including Japanese companies, located in Allied and neutral nations. *See* U. S. Dept. of State, Foreign Relations of the United States, 1951, Vol. VI: Asia and the Pacific, Pt. 1, Washington, D.C.: U.S. G.P.O. (1977) (SER 473). While the Treaty "recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war," the Treaty also recognized that the resources of Japan were not sufficient "to make complete reparation for all such damage and suffering." Treaty, *supra*, art. 14(a), at 3180 (02-1776 Pet. App. 97a). Accordingly, except for the reparations explicitly provided for in the Treaty, the Allied Powers agreed to "waive all reparations claims" as well as "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b), at 3183 (02-1776 Pet. App. 99a). The Treaty does not create – expressly or otherwise – a private right of action against Japan or its nationals, nor does it authorize any State of the United States to create such a right.

The decision to limit the amount of reparations paid by Japan, and to waive all other war-related claims, was dictated by a number of foreign policy concerns. *See generally* Statement of Interest, *supra*, at 1-2 (SER 338-39). At the time the Treaty was negotiated, the Korean War was underway, communism had taken hold of China, and Soviet expansionism was viewed as a worldwide threat. *See* Japanese Peace Treaty Negotiations, Mar. 9, 1951, printed in Execu-

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[5] The Philippines was one of the "Allied Powers" under the Treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001). The Philippines ratified the Treaty on July 23, 1956, and deposited the ratification with the United States pursuant to Article 24 of the Treaty. *Id.*

tive Sessions of the Senate Foreign Relations Comm. (Historical Series) vol. III, Part I, 82nd Cong., 1st Sess., 1951, at 261 (1976) ("Japanese Peace Treaty Negotiations") (SER 427). This political reality caused the United States to view an economically stable, anti-communist Japan as essential to U.S. interests in the Pacific region. *See* Statement of Interest, *supra*, at 4 (citing Japanese Peace Treaty Negotiations, *supra*, at 261) (SER 341). Japan would be unable to be an effective Cold War ally if its economy was stifled by the ongoing burden of unresolved war claims. *See id.* at 4, 5 (citing Japanese Peace Treaty Negotiations, *supra*, at 266-67) (SER 341-42).

The United States also wanted to avoid repeating the mistakes of the Versailles Treaty, which imposed crushing reparations on Germany at the end of World War I, and which many considered to be one of the root causes of World War II. *See* Statement of Interest, *supra*, at 2 (SER 339). If the Treaty had "validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people would be destroyed and they would sink into a misery of body and spirit which would make them easy prey to exploitation." U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) (SER 391).

Finally, the United States government concluded that its assumption of sole responsibility for Japan's recovery following the war would mean that any substantial payment of war-related claims would ultimately become the responsibility of U.S. taxpayers. *See* Statement of Interest, *supra*, at 4-5 (citing Japanese Peace Treaty Negotiations at 266-67) (SER 341-42). For all these reasons, the United States and its Allies agreed in the Treaty to waive all claims against Japan and its nationals in exchange for the forfeiture by Japan and its nationals of their foreign assets.

The Senate Foreign Relations Committee report recommending approval of the Treaty notes these concerns:

> Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, [it] would be contrary to the basic purposes and policy of . . . the United States . . . .

Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S. Rep. No. 82-2, at 2 (1952) (SER 407). The Committee recognized that the Treaty did not "give a direct right of return to individual claimants except in the case of those having property in Japan." *Id.* at 13 (SER 408). Rather, the Committee endorsed the position of the State Department that "United States nationals, whose claims are not covered by the treaty provisions . . . must look for relief to the Congress of the United States." *Id.* at 14 (SER 409).[6]

Congress decided to use the reparations it received from Japan under the Treaty – the confiscated assets of Japanese companies, other Japanese nationals, and the Japanese government located in the United States – to compensate U.S.

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[6] Article 14(b) was hotly debated in Congress, and a reservation was proposed that would have preserved individual claims by providing that "nothing contained in this Treaty shall be construed to abrogate the . . . just and proper claims of private citizens of the United States." Statement of Interest, *supra*, at 9 (quoting 98 Cong. Rec. 2365, 2567-71 (1952)) (SER 346). That reservation was deemed to be "in direct conflict with Article 14(b)," was defeated, and the Treaty ratified, unchanged. *Id.* (quoting Memorandum to The Secretary of State from Adrian S. Fisher (the Legal Adviser), Mar. 19, 1952, at 4, 5) (SER 346).

nationals who were held as POWs during the war.[7] Accordingly, it established in the War Claims Act of 1948, 50 U.S.C. app. §§ 2001 et seq. (App. 7a-20a), a federal claims mechanism by which former POWs, including these POW petitioners, could seek a share of the reparations received from Japan. Recognizing "that the question of war claims ... is too complex to be approached by the Congress on a piecemeal basis and that the subject in its entirety must be studied thoroughly before any intelligent action can be taken," H.R. Rep. No. 801-976, at 4 (1947) (SER 490), Congress charged the War Claims Commission with the adoption of uniform standards and procedures for handling war claims. 50 U.S.C. app. § 2007 (App. 18a-19a); *see also* 94 Cong. Rec. 567 (1948) (SER 504). The War Claims Act required POWs to submit their claims to the federal War Claims Commission, which was to make a final decision with respect to each claim. *See* 50 U.S.C. app. § 2010 (App 19a-20a).

The War Claims Act was intended to be the exclusive remedy for the payment of reparations to POWs. The Act does not permit any private lawsuits, and the final agency decision constitutes the only means for POWs to obtain compensation. In fact, a proposal that would have allowed federal courts to adjudicate war compensation claims was rejected because of the complexity of the issues and the need to have the claims "classified by experts who are qualified to do so" in order to "get some rationality out of this situation

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[7] The Treaty did not specify how the Allied Powers were to distribute the reparations they received from Japan. While the United States established claims mechanisms for former POWs to receive a share of the reparations, it was "the responsibility of each government to provide such compensation to the persons enjoying its protection as it may determine to be equitable out of reparations received from Japan or from other sources." Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, 82d Cong. 147 (1952) (SER 465); *see also* S. Rep. No. 82-2, at 13 (SER 408).

. . . [and] to determine the categories of claims that should be allowed." 94 Cong. Rec. 564 (1948) (SER 501).

In 1997, dissatisfied with the federal government's policies regarding the appropriate level and means of compensating victims of World War II, the California legislature launched its own efforts to provide a state law remedy for wartime injuries. One element of California's reparations legislation was section 354.6, which, as discussed above, *supra* p. 4, provides a private cause of action for "Second World War" forced and slave labor victims, including former POWs such as certain of the petitioners. Cal. Civ. Proc. Code § 354.6(b).

California also provided a private cause of action for any Holocaust victim, heir or beneficiary who "has a claim arising out of an [unpaid] insurance policy or policies purchased or in effect in Europe before 1945." Cal. Civ. Proc. Code § 354.5(b) (2003). Section 354.5 was complemented by the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code Ann. §§ 13800-13807, which required insurance companies licensed to do business in California to disclose information relating to unpaid policies issued either by themselves or affiliated companies in Europe between 1920 and 1945. This Court held the HVIRA to be preempted by the foreign affairs power of the federal government in *Garamendi*, 123 S. Ct. at 2379.

B. Proceedings in the District Courts

Shortly after section 354.6 was enacted, petitioners brought these actions in California state court. Each action, as well as several others not part of these petitions, was removed to federal court. Upon removal, some of the petitioners unsuccessfully sought remand.

For example, in *Tenney*, No. 01-17116, the district court found removal was proper because federal question jurisdic-

tion exists under the complete preemption doctrine. The district court explained that Congress's intent in ratifying the Treaty was to "preempt other laws, including state laws . . . relating to losses suffered by individuals during WWII," and to supplant them with a "trust fund for the payment of war claims as provided by the War Claims Act of 1948." SER 252-53. The district courts in other of the related cases found jurisdiction on additional grounds, including the federal common law of foreign relations. *See, e.g.*, *Poole*, No. 01-17195; *Solis*, No. 01-17134.

Eventually, the Judicial Panel on Multidistrict Litigation transferred petitioners' cases to the U.S. District Court for the Northern District of California for coordinated pretrial proceedings, along with fourteen other actions by U.S., Allied, Filipino, Korean, and Chinese plaintiffs pursuing similar claims under section 354.6.

In the Northern District of California, respondents initially moved to dismiss twelve actions by U.S. and Allied POWs. Respondents were supported in the district court by the United States, which filed a Statement of Interest urging dismissal on the ground that section 354.6 is preempted by the foreign affairs power of the federal government. SER 328-75. In opposing dismissal, petitioners again argued that the district court lacked subject matter jurisdiction over their claims. In a single opinion, the district court reaffirmed that it had subject matter jurisdiction because each of the actions asserted claims implicating the common law of foreign relations. *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 942-43 (N.D. Cal. 2000). The district court then concluded that all of the claims by U.S. POWs were barred by the Treaty and the War Claims Act. Accordingly, the court dismissed the complaints. *Id.* at 944-49. In a subsequent order, the court dismissed three later-transferred POW cases on the same grounds. App. 1a-6a.

The respondents in the Filipino cases also moved to dismiss. The district court dismissed the Filipino complaints on the ground that the claims were all barred by the Treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1157. Unlike the POW petitioners, the Filipino petitioners did not contest jurisdiction below. The district court subsequently dismissed the remaining related actions by Korean and Chinese plaintiffs.

C. The Court of Appeals Decision

The dismissals of all twenty-eight actions were appealed to the U. S. Court of Appeals for the Ninth Circuit. The United States filed an *amicus curiae* brief and appeared at oral argument to urge affirmance of the district court's ruling. In a single opinion, the court of appeals affirmed the dismissal of all actions.[8]

The court of appeals began by noting that section 354.6 "create[s] a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers." 324 F.3d at 707. The court then analyzed whether section 354.6 unconstitutionally interferes with the foreign affairs power of the federal government, in particular, "the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. The court noted that of the eleven clauses of the Constitution granting foreign affairs power to the President and Congress, seven "concern preparing for war, declaring war, waging war, or settling war." *Id.* at 711; *see* U.S. Const., art. II, § 2, cls. 1, 2 (App. 22a-23a); art. I, § 8, cls. 1, 11-14 (App. 21a). The Constitution also expressly limits the States' foreign af-

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[8] The twenty-eight cases dismissed by the Northern District of California were consolidated on appeal, along with another case based on section 354.6, *Deutsch v. Turner*, No. 00-56673. Of the consolidated cases, several are the subjects of separate petitions to this Court. *See Kim v. Mitsui & Co. Ltd.*, No. 02-1773; *Ma v. Kajima Corp.*, No. 02-1778.

fairs powers, particularly in the area of war. *See* U.S. Const., art. I, § 8, cl. 10 (App. 21a). Emphasizing that "it is clear that matters concerning war are part of the inner core of [the foreign relations] power," 324 F.3d at 711, the court concluded that "[m]atters related to war are for the federal government alone to address," *id.* at 712.

In addition, the court of appeals noted that the federal government had already exercised its exclusive authority to resolve World War II and any claims arising out of it. The United States had signed the Treaty with Japan, which did not "create[] – explicitly or implicitly – a private right of action against Japan or its nationals." 324 F.3d at 714. In the absence of some specific action of the federal government authorizing states to exercise foreign affairs powers, California had no power to modify the federal government's resolution of the war. *Id.* With regard to the POW petitioners in particular, the court noted that their claims "were addressed by the federal government" in the War Claims Act, which "conceived of no private right of action against . . . Japanese entities." *Id.* at 714-15. The court of appeals accordingly held section 354.6 unconstitutional. *Id.* at 714-16.

After eliminating section 354.6 as a basis for petitioners' lawsuits, the court considered all of the other claims and concluded they were all time-barred. 324 F.3d at 716. Finally, the court of appeals declined to revisit the argument of some petitioners that federal jurisdiction was lacking. The court did note that diversity jurisdiction existed in some cases, including *Dunn v. Nippon Steel Corp.*, No. 01-17157. *See* 324 F.3d at 718.

Petitioners requested rehearing and rehearing en banc, which were unanimously denied. Following this Court's decision in *Garamendi*, petitioners in the related case *Ma v. Kajima Corp.*, No. 02-1778, filed for reconsideration. The

Ninth Circuit denied that motion at the same time it issued the mandate on July 30.

REASONS FOR DENYING THE PETITION

I. THERE IS NO BASIS FOR REVIEW OF THE MERITS OF THE DECISION BELOW

The petitions in Nos. 02-1776 and 02-1784 raise a number of related questions challenging the merits of the court of appeals' conclusion that section 354.6 unconstitutionally interferes with the foreign affairs power of the federal government. Those questions were effectively addressed and resolved in this Court's recent *Garamendi* decision. Furthermore, the decision below is independently justified on at least two alternate grounds: section 354.6 is unconstitutional because it violates due process, and the political question doctrine dictates that these cases are not justiciable. The existence of these alternate grounds for affirmance of the opinion below also counsels against review.

A. The Court of Appeals Properly Held Section 354.6 Interferes With The Foreign Policy Choices Reflected In The Treaty of Peace With Japan And The War Claims Act

Petitioners argue that this Court should review whether the court of appeals mistakenly interpreted the Treaty as prohibiting the assertion of private causes of action by individuals against "private Japanese companies that enslaved them." 02-1776 Pet. at i; *see also* 02-1784 Pet. at 11 ("private Japanese corporations for their profit-making activities"). This question is inappropriate for review in light of *Garamendi*.[9]

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[9] The POW petitioners mistakenly characterize the decision below as necessarily resting on a conflict between the terms of the Treaty and section 354.6. 02-1776 Pet. at 12. In fact, the court of appeals did not rest its decision on any particular reading of the Treaty, but rather on a broader holding that "[m]atters related to war are for the federal govern-

Garamendi directly undercuts petitioners' fundamental assertion that their claims are private, not governmental, and therefore "neither are, nor are similar to, reparations claims." 02-1776 Pet. at 21; 02-1784 Pet. at 12. A similar argument was made by the State of California regarding the private insurance claims at issue in *Garamendi*. This Court rejected that distinction, noting that the frustration of private insurance claims "fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." 123 S. Ct. at 2380. More so than private insurance claims, claims by POWs and others held captive by the enemy during the war are quintessential reparations claims to be resolved by governments at war's end. The Treaty fully and finally resolved those claims. Treaty, *supra*, art. 14(b), 3 U.S.T. at 3183 (02-1776 Pet. App. 99a).

Petitioners similarly assert that "no treaty in the history of this Republic has ever been held by this Court to preclude the assertion of private rights of action by private citizens against foreign non-government defendants." 02-1776 Pet. at i. But *Garamendi* expressly held that the United States may properly resolve claims against foreign corporations as well as foreign governments:

> [T]he distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy . . . . Untangling government policy from private initiative during war time is often so hard that diplomatic ac-

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ment alone to address." 324 F.3d at 712. While noting that neither the Treaty nor the War Claims Act authorized any private cause of action against Japan or its nationals, the court of appeals held that "section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. According to the court of appeals, the real issue is the "lack of state power" to provide its own resolution of the war. *Id.* at 715.

> tion settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.

123 S. Ct. at 2387 (footnote omitted).

Petitioners' other arguments regarding the proper interpretation of the Treaty have been consistently rejected by the United States, *see* Statement of Interest, *supra* (SER 328-75), and are clearly without merit. Petitioners offer no rationale for this Court to accept review of these questions. Petitioners are wrong that different language used in Article 19 of the Treaty to waive claims by Japan and its nationals against the United States and its nationals suggests that Article 14(b) does not waive the claims here. 02-1776 Pet. at Part C.1.a; 02-1784 Pet. at 14-21. There is nothing ambiguous about the scope of the waiver in Article 14. As *Garamendi* made clear, the concept of "reparations" includes the types of claims asserted by petitioners, and Article 14 waives those claims, along with all other claims arising in the course of the prosecution of the war.[10] The distinctions in phrasing between Articles 14(b) and Article 19(a) reflect the different positions of the Allied Powers and Japan – which, for example, had to waive claims arising out of the post-war occupation. Petitioners' reading ignores both the plain language of Article 14(b) and the foreign policy goal underlying the Treaty – the full and final resolution of wartime claims against Japan.

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[10] The Filipino petitioners argue here, as they did below, that Article 14(b) cannot apply to their claims because their forced labor in the occupied Philippines, which was ruled by the Japanese military, did not occur "in the course of the prosecution of the war." 02-1784 Pet. at 15-20. The district court correctly rejected this argument based on its careful analysis of allegations made in the Filipino petitioners' own complaints, *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1157-58, finding the argument "seriously disingenuous." *Id.* at 1157.

The POW petitioners are also wrong to assert that the waiver of their claims by Article 14(b) was revoked by subsequent treaties between Japan and other countries. 02-1776 Pet. at Part C.2. In particular, they invoke Article 26, which provides that "[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the *parties* to the present Treaty." Treaty, *supra*, art. 26, 3 U.S.T. 3169, 3190-91 (emphasis added) (02-1776 Pet. App. 106a). Even if it could be assumed that any other nation was ever granted a "greater advantage" than that provided to the United States with respect to Article 14(b)'s waiver, it is the United States as a *party* to the treaty who has the right to invoke that clause, and the United States has never done so, nor has any other Treaty party. As the court of appeals correctly held, petitioners cannot invoke this provision, as they were not parties to the treaty. 324 F.3d at 714 n.13.

The Filipino petitioners argue that because their claims arise from violation of "*jus cogens*" norms, the claims could not be waived by any treaty.[11] 02-1784 Pet. at Part III. This question is not worthy of this Court's attention. The Filipino petitioners point to no conflict among the circuits, no conflict with any holding of this Court, and no conflict with any holding of a state court of last resort.[12] Indeed, the only other court of appeals to interpret the Treaty has held that

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[11] The POW petitioners made similar arguments below, but abandoned them in their petition to this Court.

[12] In fact, the Filipino petitioners have twisted the *jus cogens* argument beyond recognition. There is no *jus cogens* right to the remedy they seek – civil litigation in tort and quasi-contract. The Treaty acknowledged that Japan owed compensation to the Allies for war-related injuries and wrongs, including forced labor, and required Japan to pay reparations. As this Court recognized in *Garamendi*, for the "last half century" the resolution of such claims has been the subject of diplomacy and treaties. 123 S. Ct. at 2390.

claims such as plaintiffs' could be and were in fact settled and waived. *See Joo v. Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003) (affirming dismissal of claims by comfort women from the Phillipines, Korea, China, and Taiwan because the Treaty created "a settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II").

Indeed, the Filipino petitioners' position would undermine the ability of the United States and other nations to resolve wars and establish peace through the settlement of claims, and would require the abrogation of the Treaty and other international agreements that resolved World War II. Petitioners' argument is impossible to reconcile with this Court's decision in *Garamendi* affirming the settlement of the wartime claims of individuals as a "traditional subject matter of foreign policy." 123 S. Ct. at 2390; *see also Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Finally, without citing any authority, the Filipino petitioners argue that the court below erred in holding their non-section 354.6 claims to be time-barred.[13] 02-1784 Pet. at 27. However, petitioners base this argument on the dual assumption that section 354.6 is constitutional, and that it revives and extends the statute of limitations on their remaining claims. Both assumptions are wrong. As noted herein, section 354.6 is unconstitutional, even if it is viewed as purely procedural. Moreover, by its own terms, section 354.6(c) only extends the statute of limitations on "action[s] brought

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[13] Relying on the same facts underlying their section 354.6 causes of action, petitioners alleged a variety of additional claims (including accounting, unjust enrichment, constructive trust, intentional infliction of emotional distress, conversion, quantum meruit, and unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200 et seq.). The POW petitioners do not challenge the dismissal of these claims.

under this section" – not on other actions. Petitioners do not identify any California statute of limitations, apart from section 354.6(c), that permits sixty-year-old claims.

For all the foregoing reasons, petitioners have raised no issue that would warrant review of whether the Treaty preempts the assertion of their claims.

B. The Court of Appeals Did Not Inappropriately Resolve A Question of State Law

The POW petitioners argue that the court of appeals erred in holding that section 354.6 was a substantive statute creating a cause of action, rather than a purely procedural statute reviving and extending the statute of limitations on sixty-year-old claims. 02-1776 Pet. at 11. This issue does not merit review, because the court of appeals made clear that its decision did "not depend on [its] conclusion that section 354.6 is substantive law." 324 F.3d at 708. The court noted that

> [w]hether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred.

Id. Because the question whether section 354.6 is procedural or substantive "does not affect the outcome here," review is unwarranted. *Id.*

Even if the court of appeals' decision had turned on its characterization of section 354.6 as a substantive statute cre-

ating a private cause of action, review would still be unnecessary. Contrary to petitioners' assertion, this Court has expressly held that a federal appellate court may assess "how the highest court of a State would resolve a question of interpretation of State law." 02-1776 Pet. at i. *See, e.g.*, *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (noting that when there is no decision by a State's highest court, a federal court must apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State").[14] Thus, the court of appeals' conclusion that section 354.6 creates a private cause of action was both appropriate and unremarkable.[15]

Review is particularly unwarranted in light of this Court's recent decision in *Garamendi*. In that case, the insurance statute at issue (the HVIRA) was nothing more than a reporting requirement. Nonetheless, this Court held that the HVIRA employed "'a different, state system of economic pressure'" that "undercut[ ]" the foreign policy choices made

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[14] The POW petitioners assert that the California Supreme Court will soon decide whether section 354.6 is substantive or procedural in a group of related World War II-era cases. 02-1776 Pet. at 6. In fact, the California Supreme Court stayed proceedings in those cases pending this Court's resolution of *Garamendi*. Given this Court's decision in *Garamendi*, the California Supreme Court should have no need to decide whether section 354.6 is substantive or procedural, since, as discussed above, no matter its proper interpretation, the statute is clearly preempted.

[15] Rejecting petitioners' argument that section 354.6 merely extended the statute of limitations, the court of appeals correctly noted that the statute provides that certain individuals "may bring an action." 324 F.3d at 707 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 122 S. Ct. 1753, 1759 (2002), in which this Court noted that language in a statute providing that a party "may bring an action" "reads like the conferral of a private right of action"). In addition, the court of appeals noted that the statute "defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer *see* § 354.6(b)." 324 F.3d at 707.

by the President in resolving wartime claims. 123 S. Ct. at 2391 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000)). The Court noted that the President had entered into an Executive Agreement reflecting a foreign policy decision to "encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 123 S. Ct. at 2390. California, however, undertook "a different tack of providing regulatory sanctions to compel disclosure and payment" that impermissibly interfered with the executive policy. *Id.* at 2391. Significantly, this Court referred to California's Civil Procedure Code section 354.5 – the sister act to section 354.6 – as "a new cause of action for Holocaust survivors." *Id.*

Whether section 354.6 is interpreted as creating a cause of action or as resurrecting a statute of limitations on existing causes of action, it is clearly more intrusive on federal foreign affairs than the HVIRA. Unlike the insurance claims in *Garamendi,* which were not resolved at the end of World War II, but were subject to a voluntary settlement process under a later Executive Agreement, petitioners' claims were explicitly settled and waived by the Treaty. And unlike the HVIRA, which on its face did not purport to facilitate the resolution of war claims, section 354.6 applies *only* to "Second World War" forced and slave labor victims, and creates (or at least resurrects) those precise war claims. Even more than the insurance regulation in *Garamendi*, section 354.6 interferes with a "traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Garamendi*, 123 S. Ct. at 2390. It matters not whether the California Supreme Court one day interprets section 354.6 as substantive or procedural.

C. The Decision Below Is Independently Justified On Two Separate Bases

Although the court below did not need to reach several alternate arguments made by respondents, it could have reached the same outcome on at least two alternate theories. These alternate bases, too, indicate that review by this Court is not warranted.

First, applying California law to these types of claims would violate due process given the "weakness of the State's interest, against the backdrop of traditional state legislative subject matter." *Garamendi*, 123 S. Ct. at 2392. In *Garamendi*, the Court held that California's interest in assisting several thousand Holocaust survivors in the State could not displace "general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction." *Id.* at 2393 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985)). In *Shutts*, the Court held that the State must have "'significant contact or significant aggregation of contacts' to the claims asserted" in order to ensure that the application of state law would not be "arbitrary or unfair." 472 U.S. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Here, the conduct at issue is wholly unconnected to California. Neither petitioners nor respondents, at the time of the events, could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate*, 449 U.S. at 327 (Stevens, J., concurring).

Furthermore, whether section 354.6 is procedural or substantive in nature does not cure the due process violation. Even if the statute were interpreted as merely a procedural extension of the statue of limitations on claims against former enemy nationals, it would run afoul of the constitutional prohibition on retroactive legislation. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Kennedy, J., concur-

ring) (legislation with retroactive effect is a particular concern for the courts and subject to distrust under due process jurisprudence); *cf. Stogner v. California*, 123 S. Ct. 2446, 2448 (2003) (invalidating California's retroactive extension of a criminal statute of limitations as a violation of the Ex Post Facto Clause). The court below, while not deciding the retroactivity issue, recognized that "[s]uch a revival of liability – even civil liability – is troubling and raises serious due process questions." 324 F.3d at 708.

Second, the political question doctrine renders the claims brought in these cases non-justiciable. The power to make war and to enter into treaties is committed solely to the political branches. *See* U.S. Const. art. I, § 8, cls. 11, 12, 14 and art. II, § 2 (App. 21a-23a). As discussed above, the negotiations culminating in the Treaty involved complex foreign policy considerations and compromises. Petitioners seek nothing less than a judicial reexamination of policy decisions made half a century ago, pursuant to which Japan became and continues to be a vital ally of the United States. Such a reexamination would undermine the policy choices of the political branches embodied in the Treaty, involve the courts in balancing competing foreign policy concerns, and potentially expose the United States and its nationals to claims from Japanese nationals injured during the war. Even if "judicially . . . manageable standards" existed to allow courts to resolve every injury resulting from a major world war, the separation of powers precludes such a judicial undertaking. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).[16]

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[16] The court of appeals opined that no political question is raised "by the simple application of the requirements of a treaty to which the United States is a party." 324 F.3d at 713 n.11. With regard to petitioners' claims, however, it is not the interpretation of the Treaty that raises a political question, but rather petitioners' attempt to use the courts to undo the foreign policy decisions made by the President and Congress in the

II. FEDERAL SUBJECT MATTER JURISDICTION UNQUESTIONABLY EXISTS IN THESE CASES

In addition to challenging the court of appeals' decision on the merits, the POW petitioners argue that the federal courts lack jurisdiction over their claims because they are merely state law "wage claims." 02-1776 Pet. at 4. The Filipino petition raises no jurisdictional issues.[17]

The jurisdictional issue the POW petitioners raise is insubstantial and does not warrant review by this Court. First, petitioners cannot show that a determination of whether there was federal jurisdiction would change the decision on the merits, as there is undisputed jurisdiction in some of the consolidated cases. Second, petitioners have not shown, and cannot show, that any – let alone all – of the several grounds on which the various district courts found federal jurisdiction are ones on which the circuits are split, or are issues important enough to require this Court's intervention. Thus, under the Court's traditional criteria for granting certiorari, there is no reason for review of this issue. Finally, the POW petitioners' jurisdictional argument misconstrues both the nature of their own claims and the governing law. Under multiple rationales, federal jurisdiction unquestionably exists in these cases.

A. Diversity Jurisdiction Exists In At Least One Case

The court of appeals observed that in some of the actions, including one of the actions that is part of the petition in No. 02-1776, *Dunn v. Nippon Steel Corp., et al.*, No. 01-17157, there is diversity jurisdiction. 324 F.3d at 718. Petitioners

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aftermath of World War II. *See generally Garamendi*, 123 S. Ct. at 2386-87.

[17] Indeed, the Filipino petitioners affirmatively argued to the district court that federal subject matter jurisdiction was proper under the Alien Tort Claims Act, 28 U.S.C. § 1350. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1159.

do not and cannot challenge this ruling. Petitioners argue generally that "[t]he presence of California plaintiffs and defendants precludes federal jurisdiction based on diversity of citizenship." 02-1776 Pet. at 3 n.2. However, in *Dunn*, complete diversity exists, as the plaintiff is a citizen of California, and no defendant is a citizen of California. *See* 324 F.3d at 718. Thus, the lower courts unquestionably had jurisdiction to decide the issues raised in this Court.

B. The Treaty And The War Claims Act Completely Preempt Petitioners' Claims

Petitioners' efforts to divorce their claims from the wartime context in which they arose and to recharacterize them as simple state law wage claims does not survive this Court's decision in *Garamendi*. In that case, the State of California argued that the HVIRA was merely a "consumer protection" regulation designed to inform California residents which insurers failed to pay claims. 123 S. Ct. at 2392. The Court saw through this argument and held that the HVIRA was actually designed to assist "several thousand Holocaust survivors" in pursuing reparations claims. *Id.* at 2393. Noting that the resolution of "Holocaust-era insurance claims" was part of the federal government's ongoing diplomatic efforts to address the "issue of restitution for Nazi crimes," the Court held this area was a "traditional subject matter of foreign policy" that overrode state regulation. *Id.* at 2390. Where, as here, the POW petitioners' claims involve the powers of the federal government to make war and peace, and where the President and Congress have exercised their foreign affairs authority to resolve the claims of POWs exclusively through the Treaty and the War Claims Act, petitioners' purported state law claims are completely preempted, giving rise to federal jurisdiction.

Federal question jurisdiction exists as to each of the POW petitioners' actions because the Treaty and the War

Claims Act completely preempt World War II claims against Japan and its nationals. Where federal law completely preempts an area of state law, even complaints that purport to bring only state law claims are nonetheless "necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *accord Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

This Court recently explained that in determining whether Congress intended that a particular statute would completely preempt state laws on the same subject, it is appropriate to consider whether the statute concerns a subject the "special nature" of which requires "[u]niform rules . . . prescribing exclusive remedies" so as to assure "protection from 'possible unfriendly State legislation.'" *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2064 (2003) (quoting *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)).[18]

Under these principles, federal law completely preempts state laws, such as section 354.6, dealing with claims by POWs for injuries they incurred during World War II. "Vindicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject mat-

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[18] Treaties have the same preemptive force as statutes. *See, e.g., Husmann v. TWA*, 169 F.3d 1151, 1153 (8th Cir. 1999) (Warsaw Convention); *Asante Techs. v. Pmc-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001) (United Nations Convention on Contracts for the International Sale of Goods). Moreover, the complete preemption doctrine may be satisfied when the federal law provides a federal administrative remedy rather than a private cause of action and even when the federal law provides no remedy at all. *See Caterpillar*, 482 U.S. at 391 n.4; *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 396-97 (9th Cir. 2002).

ter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Garamendi,* 123 S. Ct. at 2390.[19]

With regard to wartime claims against Japan, the Treaty required Japan to pay reparations to the Allied Powers, in exchange for a waiver of all other reparations claims or other claims arising out of the war. As noted above, the Treaty reflected political and foreign policy decisions to fully and finally resolve war claims against Japan.

Using the reparations it received from Japan (the seized assets of Japan and its nationals, including Japanese companies, in the United States), Congress enacted the War Claims Act to distribute these funds to former POWs. The War Claims Act alone, which the POW petitioners inexplicably fail even to mention, provides the "exclusive" means of compensating former POWs. *Cf. Beneficial Nat'l Bank*, 123 S. Ct. at 2063-64. The Act does not authorize private lawsuits by POWs, and it makes abundantly clear that the federal government has "set forth procedures and remedies governing" such claims. *Id.* at 2063. Those "procedures and remedies" leave no room for the approach taken by California in section 354.6.

Indeed, as the legislative history of the War Claims Act shows, the need for uniform federal rules in this area was viewed as particularly important, with the question of war claims deemed "too complex" to be approached by the "piecemeal basis" of lawsuits. H.R. Rep. No. 801-976, at 4

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[19] In addition, statutes directly addressing foreign affairs – and the resolution of war claims in particular – are comparable to statutes dealing with Indian law, which displace state law even when there is no express indication of an intent to do so because of the "special federal interest" in such statutes. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)). The federal interest in statutes such as the War Claims Act is at least as unique. *Cf. Garamendi*, 123 S. Ct. at 2390.

(1947) (SER 490). Thus, Congress considered and rejected a proposal to allow federal courts to adjudicate war compensation claims because of the need to "get some rationality out of this situation." 94 Cong. Rec. 564 (1948) (SER 501). Instead, Congress chose an exclusive federal commission "in view of the large number of claimants and the diversity in the specific circumstances giving rise to the claims." *Wiener v. United States*, 357 U.S. 349, 355 (1958). Given the overriding federal interest in the resolution of war claims, the need for uniformity in this area, and the complete and final resolution of their claims under the Treaty and the War Claims Act, it is beyond question that petitioners' claims are "necessarily federal in character." *Metro. Life Ins. Co.*, 481 U.S. at 63-64; *see also Beneficial Nat'l Bank*, 123 S. Ct. at 2064 (noting relevance of special federal interest in subject area in making complete preemption determination).[20]

The POW petitioners concede as they must that the "complete preemption doctrine" provides a proper basis for federal question jurisdiction. 02-1776 Pet. at 8. Nonetheless, they argue that federal law does not completely preempt their claims because common law claims between employees and employers are traditionally governed by state law, and their claims merely involve a state's regulation of "the fairness

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[20] In *Beneficial National Bank*, the Court stressed the importance of the historical need for a national banking system free from state interference. 123 S. Ct. at 2064 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). The historical recognition of the need for federal exclusivity of foreign relations, particularly the resolution of war claims, is at least as firmly rooted. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). Indeed, the need to consolidate this power in the national government was one of the motivating forces behind the abandonment of the articles of confederation and the adoption of the Constitution. *See, e.g., The Federalist No. 3*, at 14 (John Jay) (Jacob E. Cooke ed., 1961); *The Federalist No. 42*, at 279 (James Madison) (Jacob E. Cooke ed., 1961); *The Federalist No. 80*, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

with which [its] citizens are treated in the workplace." 02-1776 Pet. at 8. Petitioners' argument ignores that at the time their claims arose, they were not employees in a workplace traditionally subject to state law regulation. Rather, they were active duty members of the United States military who were held as prisoners of war by Imperial Japan.

C. Federal Jurisdiction Exists Because A Substantial Federal Question Is An Essential Element of Petitioners' Claims

Federal question jurisdiction also exists as to each of the POW petitioners' cases because they require the resolution of a substantial federal question. *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 164 (1997) (where resolution of federal law question is necessary to a decision on the merits, federal question jurisdiction exists); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 122 S. Ct. 1753, 1758-59 (2002) ("the district court has [federal question] jurisdiction if the right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another"). To state a claim under section 354.6, petitioners were required to prove the amount of wages or compensation they "should have been paid." Cal. Civ. Proc. Code § 354.6(a)(3). Because petitioners were active duty members of the military and prisoners of war at the time their claims arose, determining the amount of wages they should have been paid for their labor necessarily requires construction of both treaties and federal statutes governing the proper pay for military personnel held as POWs.[21] *See,*

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[21] Treaties to which the United States is a party govern whether, how much, and by whom petitioners "should have been paid" for their labor as prisoners of war during World War II. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, and its 1949 counterpart, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, provide comprehensive rules for when and under what circumstances prisoners of

e.g., 1949 Geneva Convention, 6 U.S.T. 3316, 75 U.N.T.S. (providing comprehensive rules for when and under what circumstances POWs are entitled to be paid); 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021 (same); *To T.F. Conway, Dep't of the Army*, 37 Comp. Gen. 29, 30 (1957) (declaration by the Comptroller General of the United States that wages and fees received by members of the military for labor that is connected in some way to their military service belong to the federal government and must be turned over to the federal treasury).

Thus, even though petitioners purport to assert only state law causes of action, a necessary element of their claim requires the resolution of substantial questions of federal law: whether and to what extent active duty military personnel held as POWs have a right to wages from third parties for whom they worked during their captivity.[22]

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war are entitled to be paid. For example, Article 34 of the 1929 Geneva Convention provides that "belligerents" are entitled to "fix[]" the wages of prisoners of war "by agreements." 47 Stat. at 2042. Article 34 further limits and defines which prisoners are entitled to working pay and under what circumstances. *Id.* For example, prisoners working in certain capacities (*e.g.*, camp administration) are generally not entitled to pay, while others (*e.g.*, those doing work "for the account of . . . private persons") are to be paid under "conditions . . . regulated by agreement with the military authority." *Id.* Similarly, Article 62 of the 1949 Geneva Convention allows the "Detaining Power" to establish a "fair working rate of pay," which may not be less than one-fourth of one Swiss franc for a full working day. 6 U.S.T. at 3364.

[22] The Northern District of California relied on an additional, independent basis for federal jurisdiction in these cases, holding correctly that the subject matter of petitioners' claims is governed by the federal common law of foreign relations. 02-1776 Pet. App. 75a & n.6. This Court has recognized that federal common law provides the rule of decision in cases involving foreign relations. *See, e.g.*, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Several courts of appeals have concluded that the federal common law of foreign relations provides a

In sum, federal jurisdiction exists over all of these cases on several independent grounds. For all of the reasons stated above, the POW petitioners' jurisdictional arguments are not worthy of this Court's attention.

CONCLUSION

Petitioners have provided no plausible reason why this Court's limited resources should be devoted to reviewing the decision below. To be sure, many of the petitioners are World War II veterans who "incur[red] enormous personal loss to preserve our way of life against severe and imminent threats." 02-1776 Pet. at 6-7. Nevertheless, the inherent flaws in their legal arguments, especially following this Court's *Garamendi* decision, strongly counsel against review. Indeed, as one court noted with respect to claims similar to those brought by petitioners, "[i]t would be a disservice to [the] heroes of World War II to create the false hope of some sort of monetary recovery" based on state statutes that are constitutionally infirm. *Mitsubishi Materials Corp. v. Superior Ct.*, 130 Cal. Rptr. 2d 734, 737 (Cal. Ct. App. 2003). The petitions for a writ of certiorari should be denied.

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basis for removal jurisdiction. *See, e.g.*, *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); *cf. New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996). Petitioners suggest, but do not directly argue as they did below, that the Ninth Circuit rejected the federal common law of foreign relations as a basis for removal in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 123 S. Ct. 1655 (2003). 02-1776 Pet. at 4. But petitioners' suggestion reads *Patrickson* too broadly. *Patrickson* held only that removal jurisdiction could not be based on the simple fact that a foreign government had expressed an interest in the outcome of a commercial dispute. 251 F.3d at 803. The court did not have before it a case involving the federal government's exclusive powers to make wars, establish peace, and enter into treaties, nor did *Patrickson* purport to overrule other Ninth Circuit precedent such as *New SD, Inc.*, which held that federal common law can provide a basis for removal jurisdiction.

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